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In the Supreme Court of the United States

OCTOBER TERM 1972

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LAWRENCE ROSENBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Lawrence Rosenberg, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on November 20, 1972.

JUDGMENT AND OPINION OF THE COURT BELOW

On November 20, 1972 the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing Petitioner to imprisonment for a term of three years.

The opinion of the Court of Appeals has not yet appeared in the official reporter system. It is printed herewith as Appendix A.

No written opinion was entered by the trial court. The oral remarks of the trial court at sentencing appear as footnote 2 of Exhibit A, and were fully quoted by the Court of Appeals.

JURISDICTIONAL STATEMENT

After a bench trial, Petitioner was convicted of interstate fraud and of conspiracy in violation of Title 18, United States Code, Sections 2314, 1343, 1341 and 371.

On timely appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed, by an opinion issued on November 20, 1972. (Appendix A)

A Petition for Rehearing was timely filed, and was denied on December 13, 1972 (Appendix B).

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can a judgment of conviction be predicated upon the testimony of an informant where the trier of fact, after hearing all evidence, expresses disbelief of that testimony?

2. Is there any point at which public policy forbids use of or reliance upon informant testimony, where:

(a) The criminal record of the informant is vastly more serious than anything ascribed to the defendant; and

(b) In exchange for his testimony, the informant is forgiven for crimes vastly more serious than anything charged against the defendant; and

(c) The informant is totally unrepentant and his testimony is the product of a calculated transaction with the prosecution?

3. Is there any limit to the number of counts which may be charged in an essentially simple criminal fraud prosecution?

4. In a multiple-count fraud prosecution, is it necessary to show at least one instance of clear guilt of fraud to justify conviction, or can the conviction be justified by an undifferentiated view of "the total testimony"?

STATUTES INVOLVED

The criminal statutes of whose violation the Petitioner was convicted, all relate to interstate fraud. In relevant part, they are printed in Appendix C. They are:

(a) 18 USC 2314 (interstate transportation pursuant to scheme to defraud);

(b) 18 USC Section 1343 (fraud by wire);

(c) 18 USC Section 1341 (mail fraud); and

(d) 18 USC Section 371 (conspiracy).

BASIS OF FEDERAL JURISDICTION

These proceedings were commenced on an indictment returned by a federal grand jury before a District Court charging violation of federal statutes. Federal jurisdiction has never been challenged in this case.

STATEMENT OF FACTS

Petitioner and one Joseph Stein were indicted in 26 counts. Stein was named in all 26 counts, and Petitioner in 11 of those counts. Stein pled guilty, and is not involved in this Petition.

The record facts are quite voluminous. Essentially, they disclose the operation by Stein of a purported mortgage brokerage business with offices in Florida, Georgia, California and Chicago. The principal office was Chicago, and Petitioner was the principal associate of Stein in the Chicago office.

There is no question that Stein's operation was a fraudulent one. The issue related to whether Petitioner had been a conscious party to the fraud.

The 11 counts on which Petitioner was accused, related to four specific substantive transactions plus a charge of conspiracy. A brief resume of each of these transactions is here submitted.

The record involves more than a dozen identified transactions, in some of which Petitioner had no slightest personal involvement. There were dozens of witnesses, many of whose testimony was submitted through written stipulation. A complete statement of fact would require a presentation whose length is inconsistent with the purposes of a Petition for Certiorari. Accordingly, we discuss the evidence supporting the conspiracy count and the sub-

stantive counts in which Petitioner was charged, since it is these matters which most heavily demonstrate the degree of Petitioner's involvement in Stein's fraud.

Record References

The designation "Tr" refers to the stenographic transcript of the trial proceedings. The designation "C" refers to the pagination of the record documents as bound for filing in the Court of Appeals, sometimes called the "Common Law Record", including filed stipulations of testimony which witnesses would have given if called. The designations "G Ex" and "D Ex" refer to government exhibits and defense exhibits.

The Conspiracy Count (Count 26) and the Testimony of Rimanich

Approximately six years before the events in question (Tr. 50) government witness John Rimanich was convicted of a bank robbery. After serving several years of his sentence, he filed a pro se collateral attack which resulted in the vacature of that conviction on the grounds that he had not been properly admonished incident to the entry of his plea (Tr. 51). He was retried in 1966. Rejecting assigned counsel, he elected to act as his own attorney (Tr. 52) and was again convicted (Tr. 53). He appealed the ten-year sentence (Tr. 53), which was affirmed; but about eighteen months after the second trial, with credit for earlier service of sentence, he was given a mandatory parole (Tr. 54).

He was free for a period of some six months (Tr. 72-73). During that period he committed a total of four bank robberies (Tr. 74, 85). In April of 1969, he was arrested (Tr. 74) while fleeing from the last of these robberies (Tr. 76-77). Incident to his apprehension, he

was also charged with the attempted murder of a policeman who tried to arrest him (Tr. 130).

For approximately six months following his arrest, he attempted to have himself declared mentally incompetent to stand trial (Tr. 121). He had successfully defended some other criminal charges in 1962 by interposing an insanity defense. However, on this latest occasion, the court psychiatrists reported that he was competent but faking insanity. *United States* v. *Hanahan* (7 Cir. 1971) 442 F. 2d 649, 654-655.

As soon as he was declared competent, Rimanich switched his approach. Without the knowledge of his court-appointed lawyer (Tr. 82) he entered into direct negotiation with the prosecutors, offering testimony in exchange for consideration (Tr. 75-81). His "negotiations" commenced as soon as his insanity plea had been rejected (Tr. 78). He first spoke to an FBI agent, but refused to tell him anything (Tr. 80) until the negotiations had been "partially" successful (Tr. 79).

The negotiations were consummated swiftly however. At about that time, the criminal trial of one Hanahan on a charge of robbing an IRS office was commencing (Tr. 84). Two to three days after the "negotiations", Rimanich appeared as a government witness in the Hanahan case (Tr. 123). He also entered a plea of guilty to the bank robbery charge.

His sentencing was delayed for about eleven months. That delay, he testified, was due to the fact that the government wanted to arrange for a consolidated disposition of all four bank robbery charges (Tr. 85). Ultimately, he was sentenced to five years probation for the four latest bank robberies (Tr. 75).

It was an unusual form of probation; his supervision was ıtrusted solely to the United States Attorney's office, ıd not to the Probation Department (Tr. 124-125).

However, Rimanich still had a problem: By performing e second series of four bank robberies he was deemed have violated his mandatory parole from the first rob- ry conviction. This problem was solved when Rimanich ed a pro-se habeas corpus petition (Tr. 91). The peti- on was allowed. Thereupon, the government furnished imanich $500 with which to relocate himself (Tr. 127). ther state charges of armed robbery and attempted urder of the police officer were nolle-prossed (Tr. 130).

In the Hanahan trial, Rimanich testified that Hanahan, ca-ual acquaintance, had admitted to Rimanich in private nversation his participation in the robbery for which was then being tried. *United States* v. *Hanahan* (7 Cir. 71) 442 F. 2d 649. Rimanich had not been a participant the robbery, but testified for the government concern- g admissions made to him by Hanahan (Tr. 84, 144).

Rimanich frequently posed as an attorney. In addition briefing and trying his own cases, he claimed to have ritten "briefs, motions and stuff . . . for various lawyers . ." during the period of the commission of the last ries of four bank robberies (Tr. 56). He posed as an torney in visiting the Cook County Jail (Tr. 137) and, hen a lawyer objected to Rimanich's visits to his client ıd claimed that Rimanich was not a lawyer, he threatened throw the lawyer out a window (Tr. 67).

Rimanich was also acquainted with Petitioner. They ıd met when Petitioner was being held for want of bail the same jail where Rimanich was awaiting trial (Tr.). After his release, Rimanich frequented the Stein office Chicago. On the day when he was sentenced to proba-

tion under the supervision of the United States Attorney's office, he was engaged in conversation with a prosecutor. The prosecutor stated that one of his colleagues "wants to ask you some questions about somebody you know" (Tr. 92). That turned out to be Petitioner (Tr. 143).

Ultimately, Rimanich served as a government witness in this case. Against Petitioner, as against Hanahan, Rimanich testified that although he had not himself been involved in the crime, he had certain conversations with Petitioner wherein Petitioner admitted his guilt.

Rimanich's testimony, if believed, is sufficient in itself to convict Petitioner under the conspiracy count.

A great deal of Petitioner's testimony, all of his witnesses and most of his exhibits were presented only to demonstrate that Rimanich's testimony was untrue, improbable, and in some cases, physically impossible. For example, Rimanich referred to some spurious surety bonds, written by purported surety agents named Kelley and Cooper, which had been given to some of Stein's customers. Petitioner had helped to prepare the bonds, but stated that he believed that Kelley and Cooper were genuine surety agents. Rimanich testified that the night before those bonds were written, Rosenberg had taken Kelley and Cooper "cabareting" and had later told Rimanich that the bonds were fraudulent (Tr. 21-22). But the hotel records (D. Ex. 10 and 11) and the stipulated testimony of an officer of the hotel (C. 378-380) established that Kelley and Cooper had not come to Chicago until the day on which the bonds were written, and had taken their meals in their hotel room and in other facilities. Thus it is objectively established that Rimanich's story of that event could not be correct.

Rimanich testified that Petitioner was the conscious controlling party in the fraudulent scheme. The trial court, in passing judgment, rejected that view, expressing the belief that Stein had been the principal malefactor, but convicted Petitioner as an aider and abettor. (Appendix A, footnote 2).

The Klopfenstein Counts
(Counts 1, 2, 3, 4 and 5)

These counts were atypical in that of all the transactions charged against Stein, the Klopfenstein matter was the only one in respect of which Petitioner contended that no fraud had been practiced.

Klopfenstein was a real estate developer promoting a project known as "Lake Diane". He had encountered serious financial difficulties. His bankruptcy petition filed in November of 1970 (D. Ex. 18) shows that at the time he first came to Stein he was completely insolvent.

Before coming to Stein, he had issued payroll checks which had been returned by his bank for want of funds (Tr. 271-273) and had been unsuccessful in other attempts to obtain finance (Tr. 275-276).

On his direct examination, he testified that he came to Stein for "a loan" (Tr. 235); that Stein suggested financing through a firm known as "Church of Christ Manors, Inc." (Tr. 238-242); and that Stein provided Klopfenstein with information concerning the financial strength of Church of Christ Manors, Inc. (Tr. 264). Based on this, he testified, he paid a total of $20,000 to Stein as an advance fee for the obtaining of a $2,000,000 loan from Church of Christ Manors, Inc.

However, on cross examination, confronted with irrefutable documentary evidence, Klopfenstein admitted that

long before even hearing of Stein, he had pledged the stock of his Lake Diane corporation to his lawyer as security for a debt of more than $100,000 (Tr. 256-258). He then entered into a business association known as "B.A.L.D., Inc." with other promoters for the promotion of his project. The principals of B.A.L.D., Inc. had obtained a Church of Christ Manors loan commitment (Tr. 282-284; D. Ex. 5). This was principally the work of a Klopfenstein associate named Buchanan, whom he identified as the "sixth descendant of President James Buchanan" (Tr. 278). Klopfenstein wanted the Church of Christ Manors commitment switched over from B.A.L.D., Inc. to his individual name, presumably in order to exclude his new associates. He went directly to Church of Christ Manors, who referred him to Stein (Tr. 280, 290, 291). That was the first he had ever heard of Stein, who had no relationship whatever with the B.A.L.D. associates or with Buchanan.

Klopfenstein brought B.A.L.D.'s Church of Christ Manors commitment to Stein (Tr. 290). *Klopfenstein gave Stein* a financial statement of Church of Christ Manors. Stein expressed great interest in that document, and took it from Klopfenstein on a promise to copy it and return it (Tr. 279). Thus, all information concerning Church of Christ Manors was given by Klopfenstein to Stein, and not the other way around.

When Klopfenstein first came to Stein, he brought a financial statement which was intended to show his approximate financial condition (Tr. 314). The statement showed a net equity of $7,744,822.21. However, the statement was completely inaccurate, even omitting the fact that the Lake Diane stock had been pledged as security and the existence of the secured debt, as well as many others. (D. Ex. 7).

At that point, Stein called in Petitioner. Petitioner, working with Klopfenstein *and with his attorney,* (Tr. 239) worked out a written agreement (Tr. 243). The agreement contemplated a $2,000,000 loan, with a ten per cent service charge. $20,000 of that sum was payable in advance as a consulting fee. The first step was to provide evidence of the collateral to support the loan. Klopfenstein agreed to supply this within forty-five days; if he did not, he was entitled to demand a refund of one-half of the $20,000. Alternatively, and at his option, he could claim another forty-five days within which to produce title evidence and collateral, in which case the entire $20,000 would be considered earned (G. Ex. 35).

Klopfenstein, of course, could not produce the collateral. Illustrative of his problem, is the fact that the accounts receivable, valued on Klopfenstein's statement at $434,000 (D. Ex. 7) had already been sold to Associates Discount Corporation, and were badly in default (Tr. 611). In fact, that default had caused Klopfenstein's corporations to go into receivership in September of 1967 (C.R. 112, p. 8). At the end of forty-five days, Klopfenstein did not exercise his option to terminate the contract. Petitioner continued to work on the matter throughout the entire ninety-day period and even thereafter. At one point, he sent a land expert to the property who found zoning and sewage problems (Tr. 627). Even after the expiration of the ninety-day period, Petitioner continued to work on the matter for months (Tr. 627).

There is no evidence whatever of any misrepresentation by Petitioner (or even by Stein) to Klopfenstein. No loan was ever obtained by Klopfenstein; but Klopfenstein did not have the loan collateral warranted by his financial statement.

The Cunningham and Wachter Counts
(Counts 8 and 9)

In February of 1968, Stein agreed to obtain for Cunningham and Wachter a loan commitment for $1,000,000. From Phoenix, Wachter sent $500 to Stein in order to get Stein to come to Phoenix to discuss the loan. On February 23, 1968, Stein flew to Phoenix, received $10,000, and agreed to provide a Church of Christ Manors commitment (G. Ex. 3 and 4). Such a commitment was in fact delivered on February 28 (G. Ex. 5).

Petitioner had no relationship whatever to this transaction. Prior to receiving the commitment, Wachter had a telephone conversation with a man in Stein's office who identified himself as Petitioner. The nature of those conversations was not disclosed (C. 358).

Petitioner testified that after the commitment had been delivered, Wachter called Stein's office and spoke to Petitioner relative to changing some of the language in the commitment. He made the changes, turned the document over to Stein, and had no further contact with the matter. He received none of the money (Tr. 506-507).

There is no evidence that Church of Christ Manors was anything other than a completely legitimate source of loan commitments, and certainly no faintest suggestion that Petitioner had any knowledge concerning it.

The Halbert Count
(Count 11)

Stein was not directly involved in the Halbert transaction. In June of 1969 Halbert, a motel-restaurant owner in Helena, Montana, met one Blaz, another Stein associate, and paid him $1,000 pursuant to an agreement (G. Ex. 21) for the obtaining of a $200,000 mortgage. Two weeks later,

Blaz told Halbert that the money was ready, but that $2,000 more would be needed. Halbert refused to pay, and asked for a return of his deposit. He made several efforts to obtain a refund from Blaz but did not succeed (C. 366).

A month later, he received a letter from Petitioner stating that "we have an interested lender", but that an appraisal, contractor's estimates and financial statement were needed. There is no record of any response to that letter. Petitioner testified that he wrote it at the request of Blaz, who informed him that he had active interest from a lender, but was embarrassed to admit that he had lost the documents furnished by Petitioner (Tr. 567-569).

The letter was Petitioner's only relationship to the transaction.

The Schienthal-Guggenheim Counts
(Counts 20 and 22)

Schienthal and Guggenheim, partners in a venture known as Florida Nursing Homes, sought a $900,000 loan to improve the Tampa property. In October of 1968 they met one Harvey Goodman, who took $4,000 from them on a promise of a loan through the Teamster's Union (C. 361-367).

In November of 1968, Goodman sent them to Chicago where they met Stein. Stein agreed to make a $900,000 loan through a British insurance company (G. Ex. 24). They paid Stein $9,000 (G. Ex. 25). Although they were promised they would receive their loan promptly, no loan was ever received.

Petitioner had no relationship to that transaction. However, some time later, Schienthal and Guggenheim were furnished a surety bond guaranteeing payment of any loan they may make. These bonds were provided by two men

named Kelley and Cooper, under circumstances disclosed within the discussion, immediately ensuing, of government witness Rimanich. Petitioner helped to prepare those bonds.

Trial Court Findings

The trial judge, in passing judgment, stated that there was no doubt concerning the suspect quality of Rimanich's testimony, "but that is not controlling on the issue before me". The issue, he stated, was whether Petitioner had been a knowing and willful participant in the fraud, "and in that connection it does not take the testimony of Rimanich to establish that. If the testimony of Rimanich were all the government had, I don't think they would have a case." Rimanich had testified that Petitioner was the principal in the fraud. The court expressed the belief that Stein was "the heavy", but noted that an aider and abettor would be equally guilty. "Evaluating the total testimony", he found Petitioner guilty on all counts. (Appendix A. footnote 2.)

Appellate Review

Petitioner appealed, contending that discounting the Rimanich testimony, there was no meaningful evidence of guilt on his part. The reviewing court held that the trial court's comments were not to be construed as "totally discrediting the witness Rimanich", and noted that the trial court had relied on "the total testimony". In any event, the reviewing court, without specific reference, stated that even without the testimony of Rimanich, the remaining evidence would suffice to establish guilt. (Appendix A)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

We pray the corrective Writ of Certiorari because we believe that the Court of Appeals opinion tends strongly to exacerbate two of the most disturbing tendencies in modern federal criminal practice. These are veneration of the informer, and conviction on the amorphous multiple charge.

The Accomplice-Informer Problem

We believe that the facts above recited concerning government witness Rimanich, present one of the most grotesque pictures ever to be displayed to this Court. Those facts may also present the most disturbing instance of a growing tendency: Conviction on the testimony of an informer who, for his testimony, is forgiven crimes infinitely worse than those concerning which he testifies.

If the objective of criminal justice is to obtain the maximum number of convictions, such practices may be justified. But if criminal justice has any other objective, a decent public policy must forbid forgiveness to near-monsters in exchange for their testimony against persons whose offenses are relatively innocuous compared to those of the persons upon whom the government relies to convict them.

The importance of the informer as a source of government testimony, needs no recitation here. It was definitively adumbrated in *Rugendorf* v. *United States* (1964) 376 U.S. 528 and was discussed at length within the government submissions filed in that case. It would be nothing more than an exercise in useless pedantry to cite examples

of the innumerable cases in which convictions have depended upon accomplice and informer testimony.

And the lesson is known at levels much less sophisticated than that of this Court. There is hardly a criminal extant who is not aware that if caught, he can always achieve forgiveness of his crimes by accusing better men than himself of lesser offenses than his own, and volunteering to testify in support of those accusations.

The record facts concerning Rimanich are eloquent testimony to this proposition. Rimanich is a bank robber, prison-schooled in the rudiments of law. Paroled from one bank robbery sentence, he committed four additional bank robberies within six months. Fleeing from the last of these, he attempted to murder one of the policemen who caught him. Apprehended, he cynically attempted to have himself declared insane. When that failed, he turned to the one thing that he knew would work: Volunteering as a government witness.

Rimanich testified only twice: Once against Hanahan, and once against Petitioner (Tr. 83). In consequence:

(a) he was given five years probation as punishment for four bank robberies committed while on mandatory parole from an earlier bank robbery.

(b) He was released from confinement on the charge of "parole violation", a modest enough description of four bank robberies coupled with attempted murder.

(c) State charges of armed robbery and attempted murder, were dropped.

(d) He was given $500.

We have no authority suggesting that the government is not free to do this. We merely know that it is disgrace-

ful and irresponsible. That is the "authority" which we submit.

In our sober moments, as a society, we know better. If, in any other context, a lawyer were to agree to pay a witness $25 for favorable testimony, that lawyer would certainly be disbarred and quite possibly jailed. But a lawyer seeking to convict a fellow citizen of a crime, may offer to one of the most dangerous men alive, money and a lifetime of freedom for his questionable testimony, and the activity is considered proper.

Surely, there must be a point at which a decent regard for amenities will call forth the supervisory power of this Court to put limits on this practice, which is simply not consonant with the dignity of decent government. It degrades the process of the courts in which the testimony is given. And it enhances, tremendously, the likelihood of the conviction of the innocent.

The proposition that "accomplice" informer testimony must be viewed with suspicion is enshrined in boiler plate jury instructions. However, that admonition goes cynically unheeded in most cases, because the very prestige of the federal government imparts a specious respectability to such testimony. Yet, the basic truth remains: The normal motivations of the accomplice informer tend virtually to assure that his testimony will not be reliable. The informer shortcut to conviction has only one claim to consideration: Its ease of application.

In this case, an informer, whose story was, in vital aspects, disproven to a mathematical certainty, is nonetheless endorsed as a source of incriminating evidence. The endorsement, in fact, is completely gratuitous, if it

be the fact (as the opinion states) that the remaining evidence, discounting his testimony, is sufficient to convict.

In that aspect, the only possible lesson of the opinion is that the traditional caveat concerning accomplice informer testimony, retains no practical meaning.

That, because the Judge "evaluated" the total testimony. But when did a trier of fact *not* evaluate the total testimony? It would be a clear failure of responsibility not to have done that. An evaluation of Rimanich's testimony was merely a condition precedent to finding it unreliable.

Thus, we are left with the supposition that the Judge, as trier of fact, may have believed some unspecified part of Rimanich's testimony.

Both parties expressly conceded in the Court of Appeals that Rimanich's testimony, if taken as true, would be sufficient in itself to establish guilt on the conspiracy count. Yet, the trial judge expressly stated:

> "If the testimony of Rimanich were all the government had, I don't think they would have a case." (Quoted in footnote 2, Appendix A)

It necessarily follows — with logical certainty — that the trial judge did not believe at least one statement by Rimanich which would be indispensable to proof of guilt of conspiracy. Since Rimanich offered no testimony whatever proving any substantive count, it is impossible to imagine how conviction can be predicated upon reliance "on portions of that testimony" (Opinion, p. 3). If so, which portions?

• • •

There are laws of nature which govern the testimony of any repeating informant such as Rimanich. They might be summed up thus:

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1. *An informer becomes dependent upon the prosecutor who employs him.* Necessarily so. As he informs, his accustomed avenues of gratification are foreclosed. His only source of protection and well-being is his new ally. (In this case, the informer was literally paroled to the prosecutor.)

2. *An informer is continuously under pressure to provide additional information.* Again, necessarily so, since prosecutors and police cannot be expected to extend endless indulgence to an informer who is no longer useful.

3. *The quality of an informer's product diminishes with the passage of time.* And it must, since he becomes debarred from access to reliable information, and because of rule 4.

4. *An informer, if used long enough, must ultimately say what he believes the police and prosecutors want to hear.* Even if his first offerings are sincere, *the repeated and multiple informer,* such as Rimanich, must ultimately reach the stage at which he is providing information for the safe of information, lest he should suffer loss of usefulness to his employer.

In the case of Rimanich, there was nothing but cynicism from the beginning: No remorse, no disentanglement, nothing but a cynical effort to make the best possible deal for himself after his gun had misfired in his attempt to murder the policeman who apprehended him fleeing from the latest of his bank robberies. This was a less than auspicious beginning for his career as a witness testifying to things he had heard people say about crimes in which he had not directly participated.

The opinion below says of this man, that his testimony, although very certainly untrue in significant parts, may nonetheless become a meaningful basis for conviction of

those against whom he testifies. We think this Court may come, in time, to regret the manner in which that suggestion will inevitably be exploited.

Nothing is less needed in today's prosecutive climate than a diminution of the skepticism with which the testimony of accomplice informants is to be entertained. The opinion will serve as encouragement for use of the demonstrably unreliable alleged accomplice to flesh out every instance of equivocal proof of guilt. And such persons are all too readily available. They roam through every community and walk of life, freely committing their crimes with cynical confidence in their insurance against meaningful punishment in the event of their apprehension.

The Problem of Synergism

The opinion below states that the court considered all of the evidence. But no fact whatever is cited to support the conclusion "that appellant knowingly participated in the scheme charged in the indictment." Thus, the opinion raises the haunting specter of the customary synergistic effect of the multiple count indictment, wherein the multiplication of zero by ten frequently results in an unspecified product equalling one or more.

The thesis underlying many multiple count prosecutions, is that the evidentiary picture should be complicated to the greatest possible degree. If there exist several transactions in which the proof of guilt is questionable, the prosecution may reasonably hope that by lumping them all together, some pattern of guilt may emerge. True, on completion of the case, nobody is quite sure what has been proved or against whom. But it is generally unnecessary for the prosecution to worry about that, for the appellate remedy is simply not designed to accommodate detailed reconstruction of multiple independent transactions.

One problem is the constitutional requirement that a defendant be advised of the nature and cause of the accusation against him. But even that can be turned to advantage by breaking down a given transaction into a large number of component offenses and pleading each one separately. Thus, in the case at bar, the Klopfenstein transaction is pleaded in five different counts. If such procedure has any purpose other than improperly to deflect the trier of fact (normally a jury), that purpose has never been expressed.

What results is an amorphous charge, established by shotgun evidence, in a proceeding whose basic philosophy is that if one produces a sufficient sheer volume of testimony, it will necessarily follow that he must have proved something important.

This objective is not achieved without a price. The impact upon judicial economy is obviously adverse. One experienced trial judge has recently called for the elimination of multi-count indictments because of the manner in which they complicate pleading and obstruct an expeditious trial. Campbell, *Delays in Criminal Cases,* 55 F.R.D. 229, 244. The effect on basic fairness is no less unfortunate, since such indictments present the maximum challenge to the investigative resources and financial staying power of the defendants thus impacted.

The impact of these procedures upon considerations of judicial economy and basic fairness, is obviously adverse. Court time is consumed immoderately, and the maximum challenge is presented to the investigative resources and financial staying power of the defendants thus impacted.

No case that will ever be argued before your Honors, will present a more severe test of the propriety of this procedure than will the case at bar. The defendant here,

in an effort to reduce the standard multiple prosecution to manageable proportions, and in an attempt to focus attention clearly on the issue of his individual guilt, took every possible clarifying step. He stipulated to the testimony of all witnesses who had nothing to say about him, and of many witnesses who did. He waived jury. Even in equivocal cases, he did not contest Stein's basically fraudulent predilections. He did everything humanly possible to rivet attention on the central issue: What crime, if any, was committed by *this* defendant?

Yet, both in the trial court and on appeal, he has been found "generally" guilty, without any statement as to *why* he is guilty.

That, even as to the five Klopfenstein counts. On direct examination, Klopfenstein claimed that he had been defrauded: He came to Stein, was sold a Church of Christ commitment for $20,000, and was unable to get the commitment funded. But on cross-examination, after several denials and confrontations with documents, Klopfenstein finally admitted that he came to Stein already armed with a Church of Christ commitment, made out to a third-party corporation to whom he had already given an amorphous interest in the very project that he sought to finance through Stein. He also gave Stein a financial statement of the Church of Christ. His request to Stein was that the Church of Christ commitment be rewritten so as to run directly to Klopfenstein, himself, rather than his erstwhile associate's corporation. Stein delivered exactly what had been requested. Substantial additional help was needed to prepare the matter for submission to a lender, since a commitment is of no help if one does not own the proposed collateral. An agreement was made for $17,000 for additional services, and there is no suggestion that the agreement was not performed.

And where did Rosenberg fit into this picture? In Klopfenstein's words,

> "Rosenberg never made any promises regarding the mortgage commitment. He said he was working up an agreement which would make the offer acceptable to a lender. I asked Rosenberg where the money might come from, but Rosenberg stated that he didn't know." (Tr. 319)

The witness conceded that the things told to him by Rosenberg were different from those recited by Stein (Tr. 319-320).

Yet, Petitioner is deemed guilty on the Klopfenstein counts—although the testimony of the victim himself establishes his innocence beyond cavil, and although the transaction as ultimately conceded by that victim on cross-examination bore no meaningful similarity to that described on his direct testimony. The noncommittal finding of Petitioner's guilt can only serve to encourage the use of smoke as the basic prosecutive weapon. Smoke serves two purposes: It obscures the view, and it generates a presumption of fire. In its prosecutive form, it consists of a large number of equivocal witnesses and a multiplicity of charges, all designed to generate the belief that the defendant must have done something wrong, even if no one is quite sure what it was.

No greater encouragement could be given to such a practice, than to gaze at the resulting record and conclude generally that the evidence, "construed . . . most favorable to the government . . . leads unerringly to the conclusion that appellant knowingly participated . . ."

The "bushel-basket" prosecution, of this type here reviewed, effectively destroys the concept of proof beyond reasonable doubt and renders nugatory the constitutional requirement of notice of the precise nature of the charge.

It also serves to make prosecutions unreasonably time consuming and hopelessly expensive to defend. The losers are not only the defendants impacted, but the clogged court system and the burdened taxpayer as well. But it will continue to be the favorite prosecutive ploy so long as it is successful in eliciting weary acquiescence predicated upon an undifferentiated view of "the evidence as a whole."

Conclusion

It was an act of startling political irresponsibility to have freed a multiple bank robber, with a past history of bank robbery convictions, apprehended at the risk of the attempted murder of the arresting policeman, in exchange for his testimony against others. But it is worth it, from a prosecutive standpoint, if the resulting testimony, even though not believed, can nonetheless contribute to a conviction.

It was likewise irresponsible to have taken an essentially simple case and complicated the action beyond recognition by multiple charges and interminable evidence which can numb the critical faculties of any trier of fact. But this practice, likewise, will persist as long as it works.

The lesson of the opinion below is that it does indeed work—as a matter of expediency, if on no other basis.

We pray this Court's writ of certiorari in the exercise of its supervisory power.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX

APPENDIX A

Opinion of the Court of Appeals

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 72-1071

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LAWRENCE ROSENBERG,

Defendant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 CR 317 — FRANK J. MCGARR, *Judge.*

ARGUED OCTOBER 25, 1972 — DECIDED NOVEMBER 20, 1972

Before KILEY and STEVENS, *Circuit Judges,* and KILKENNY, *Senior Circuit Judge.**

PER CURIAM. After trial without a jury, the district court convicted appellant on 11 counts of an indictment charging him with interstate fraud by transportation, wire

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* Senior Circuit Judge John F. Kilkenny of the United States Court of Appeals for the Ninth Circuit is sitting by designation.

and mail, and with conspiracy. A co-defendant, Joseph Stein, pleaded guilty to all of the 11 counts naming appellant, as well as to 15 other counts in which appellant was not named. Acknowledging Stein's guilt, appellant contends that the evidence was insufficient to support his conviction as a principal in the fraudulent scheme. We affirm.

The principal transactions described in the indictment and by the evidence took place in 1968 and 1969. During that period appellant and Stein engaged in what was purportedly a loan brokerage business. In exchange for an advance fee, Stein undertook to obtain sizable loans for prospective borrowers. While Stein dealt directly with prospective borrowers, Rosenberg worked largely on documentation, or "packaging," of presentations to be made to lending institutions. In theory, the advance fee was refundable if loans were not obtained. In practice, however, Stein and Rosenberg made little or no effort and regularly failed to obtain financing; nevertheless, with rare exceptions, all or substantially all of the advance fees were retained.[1]

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[1] Appellant was convicted on counts 1, 2, 3, 4, 5, 8, 9, 11, 20, 22, and 26. Counts 1-5 (the "Klopfenstein counts") related to an advance fee of $20,000 received in May of 1968 for which Stein was to obtain a $2,000,000 loan; $1,000 of the fee was ultimately refunded to the prospective borrower's attorney. Counts 8 and 9 (the "Cunningham and Wachter counts") concerned a $10,000 fee for a $1,000,000 loan in February of 1968. Count 11 (the "Halbert count") dealt with a $1,000 fee for a $200,000 loan in June of 1969. Counts 20 and 22 (the "Schienthal-Guggenheim counts") concerned fees of $3,000 to an unindicted co-conspirator (Harvey Goodman) and $9,000 to Stein for a $900,000 loan in November of 1968. Count 26 was a conspiracy count.

In addition, the parties stipulated to numerous other equally illusory transactions, which, together with the above transactions, involved $143,581.20 in unrefunded advance fees. Appellant acknowledges that the evidence plainly established that the purported brokerage service was a fraud.

It is appellant's theory that the evidence fails to disclose that he was a conscious participant in any fraudulent aspect of the business, that his activities were almost entirely limited to the "shaping" of "packages," and that he has no criminal responsibility for Stein's misbehavior.

Appellant graduated in 1953 from Long Beach State College, receiving a degree in business administration. He first met Stein in 1961, and continually thereafter maintained a social relationship with him. From 1963 until July of 1966 appellant was employed by Stein in a loan brokerage business. As a result of transactions occurring during that period, Stein was charged with various acts of fraud; appellant knew of those charges against Stein when he participated in the fraudulent scheme charged herein. Appellant officed first with an unindicted coconspirator and formed business associate (Erwin Blaz) and then with an attorney (Seymour Kurtz) before returning to work for Stein in January of 1968. During the 1968-1969 period, with which this case is principally concerned, appellant was compensated on a "per deal basis." Effective in January of 1970 the form of the business enterprise was changed and appellant was made president of the corporation which was to operate thereafter. The evidence indicates that during 1968 and 1969 substantially all, if not all, of the responsible work performed by the business was handled either by Stein, by appellant, or by the two of them together. The inference that appellant was intimately acquainted wtih the details of the operation is inescapable.

The Government's principal witness was one John Rimanich, who became acquainted with appellant while both were incarcerated in the Cook County jail in 1968. His testimony, if believed, unequivocally establishes appellant's guilty participation in the fraudulent loan busines

Rimanich, however, is a character of doubtful credibilit and his testimony was impeached in various respect

It is appellant's theory that the trial judge totall dicredited Rimanich's testimony and that without it th evidence of guilt is insufficient. Based on our study of th record we are satisfied that there are two fatal defects i appellant's argument.

First, we do not construe the trial judge's comments a totally discrediting the witness Rimanich. As we read th court's statement, he expressed the opinion that if th government's evidence consisted solely of the Rimanic testimony, it would not be sufficient to establish guil beyond a reasonable doubt. We believe, however, that th court expressly relied on portions of that testimony a a part of "the total testimony" which he evaluated i determining that appellant was so involved in the schem as to share Stein's guilt.[2]

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[2] "THE COURT: Gentlemen, I have considered the evidenc I have reviewed my own notes of the testimony. I listened a tentively to your argument.

"I do have an observation or two to make in support of th decision I will ultimately render in this case.

"It appears to me, beyond a reasonable doubt—in fact, beyon any doubt—that out of the various offices mentioned, 209 Sout LaSalle, 11 South LaSalle and under the various names me tioned, First Available Fund, National Financial Services, wh have you, that a scheme to defraud was being operated.

"The principal architect and perpetrator of that scheme seem to have been Joseph Stein. To use the words of Mr. Lewis arguing, that Mr. Rosenberg was not the heavy in this fraudule scheme. I don't suppose, Mr. Lewis, that is really an issue, bu if I had to vote on who the heavy was, I would say that th heavy was Mr. Stein.

"I agree with you also that the testimony of Mr. Rimanich suspect, there's no doubt about that. I think that's apparent

Second, having reveiwed the testimony, stipulations, and many of the exhibits, we are persuaded that even without the testimony of the witness Rimanich, the remaining evidence, construed as it must be on appeal most favorably to the government, also leads unerringly to the conclusion that appellant knowingly participated in the scheme charged in the indictment.

The judgment is

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

(Footnote continued)
everybody who has seen the man and observed him and knew his background. But that is not controlling on the issue before me.

"The issue before me here is whether co-defendant Lawrence Rosenberg was a knowing and willful participant in the fraudulent activities that were taking place in the offices described. And whether his participation furthered the scheme to defraud that was going on there.

"And in that connection, it does not take the testimony of Rimanich to establish that. If the testimony of Rimanich were all the Government had, I don't think they would have a case. But I must note in evaluating the total testimony to determine whether, in fact, Mr. Rosenberg was so involved, knowingly, I must take note of Title 18, Section 2, that says, 'That whoever aids and abets the commission of offenses, is guilty as principal and punishable as such.'

"On the basis of evidence that I have heard, I find Mr. Lawrence Rosenberg guilty as charged in Counts 1, 2, 3, 4, 5, 8, 9, 11, 20, 22 and 26 of the indictment." Tr. 720-721.

APPENDIX B

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 13, 1972

Before

Hon. ROGER J. KILEY, *Circuit Judge*
Hon. JOHN F. KILKENNY, SR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

No. 72-1071

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LAWRENCE ROSENBERG,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(70 CR 317)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be and the same is hereby *denied.*

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APPENDIX C (STATUTES)

18 U S C Sec. 2314 provides, in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more;

* * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * *

18 U S C Sec. 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U S C Sec. 1341 provides, in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to

do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, * * * shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U S C Sec. 371 provides, in relevant part:

If two or more persons conspire either to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *